No. 12235

United States
Court of Appeals
for the Ninth Circuit

ELMER SCHNEIDMILLER,

Appellant,

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Eastern District of Washington,
Northern Division

Typo Press, 1017 California Drive, Burlingame, Calif. 5—23—49

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

EGGERMAN, ROSLING & WILLIAMS,

DeWITT WILLIAMS,
918 Joseph Vance Bldg., Seattle 1, Washington,

Attorneys for Plaintiff.

GRAVES, KIZER & GRAVES,
1224 Old Nat'l Bank Bldg.,
Spokane, Washington.

HUGHES & JEFFERS,

SAM R. SUMNER, Sr.,
Wenatchee, Washington,

Attorneys for Defendant.

In the United States District Court for the
Eastern District of Washington,
Northern Division

In Bankruptcy—No. 744

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt,

Plaintiff,

vs.

ELMER SCHNEIDMILLER,

Defendant.

COMPLAINT

Plaintiff alleges as follows:

1. The action arises under Section 70 of the Act of Congress relating to Bankruptcy, (U.S.C. Title 11, Chapter 7, Sec. 110) as hereinafter more fully appears.

2. At all times herein mentioned Northwest Chemurgy Cooperative was and is now a Washington corporation hereinafter sometimes referred to as "Chemurgy".

3. On May 29, 1947, Chemurgy duly filed a Petition for an Arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37569. On said date said Court entered an order accepting and approving Chemurgy's Petition for an Arrangement as properly filed under Chapter XI of said Act.

4. Chemurgy was unable to consummate the pro-

posed Arrangement and upon a hearing duly noticed and held pursuant to Section 376(2) of the Act of Congress relating to Bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a Bankrupt under said Act and that Bankruptcy be proceeded with pursuant to the provisions of said Act.

5. Subsequent to said order determining Chemurgy a Bankrupt, after proceedings duly had therefore, plaintiff on January 6, 1948, was by the order of said Court duly appointed Trustee of the estate of said Bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

6. At all times herein mentioned Sections 5831-4 and 5831-6 of Remington's Revised Statutes of the State of Washington (Laws of 1941, Cha. 103), Secs. 1 and 3 were in full force and effect. Said statutes provide as follows:

"5831-4, Preference by insolvent corporations—Definition. Words and terms used in this act will be defined as follows: (a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating office of an insolvent corporation. (b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made, or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise

authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. L. '41, ch. 103, Sec. 1."

"5831-6 Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded. L. '41, ch. 103, Sec. 4."

7. For at least four (4) months immediately prior to May 29, 1947. Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington.

8. Within said four months' period Chemurgy being then insolvent paid to the defendant above-named a total of $4,766.03 upon an antecedent debt or debts then past due and owing by Chemurgy to said defendant upon which defendant is entitled to an offset of $ (None) for credit given within said four months' period.

9. The effect of such payment is to enable the said defendant to obtain a greater percentage of the indebtedness due to said defendant than other creditors of the same class.

Wherefore, plaintiff prays for judgment against the defendant in the sum of $4,766.03 with interest and with costs taxes in favor of the plaintiff and against the defendant.

/s/ EGGERMAN, ROSLING & WILLIAMS,
/s/ DeWITT WILLIAMS,
Attorneys for Plaintiff.

[Endorsed]: Filed May 28, 1948.

[Title of District Court and Cause.]

SUMMONS

To the above-named Defendant Elmer Schneidmiller.

You are hereby summoned and required to serve upon Eggerman, Rosling & Williams, plaintiff's attorneys, whose address is 918 Joseph Vance Building, Seattle 1, Washington, an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: May 28, 1948.

(Seal) A. A. LaFRAMBOISE,
Clerk of Court.
By /s/ EVA M. HARDIN,
Deputy Clerk.

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 29th day of May, 1948, I received the within summons and complaint and executed same by serving a true copy of same upon Elmer Schneidmiller at St. John, Wash., on May 29th, 1948.

WAYNE BEZONA,
United States Marshal.
By /s/ CHARLES W. CARLILE,
Deputy United States Marshal.

Marshal's Fees: Travel $5.00; Service $2.00; Total $7.00.

[Endorsed]: Filed June 5, 1948.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes now the defendant, Elmer Schneidmiller, by his attorneys, Hughes & Jeffers and Sam R. Sumner, Sr., and respectfully moves the Court for the entry herein of an order dismissing the above-entitled action, upon the grounds that the plaintiff's complaint herein fails to state a claim upon which relief may be granted.

In support of this motion there is hereto attached statement of the reasons upon which defendant bases this motion.

Dated this 17th day of August, 1948.

HUGHES & JEFFERS,
By /s/ JOSEPH L. HUGHES,
/s/ SAM R. SUMNER, SR.,
Attorneys for Defendant.

[Endorsed]: Filed Aug. 19, 1948.

In the District Court of the United States for the Eastern District of Washington, Northern Division

Civil Action No. 724

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt,

Plaintiff,

vs.

F. A. DE VOS d/b/a Ad-Art Printing Co.,

Defendant.

OPINION OF THE COURT

Eggerman, Rosling & Williams, 918 Vance Bldg., Seattle, Washington, Attorneys for Plaintiff. Hughes & Jeffers & Sam R. Sumner, Wenatchee, Washington, Attorneys for Defendant.

Hughes & Jeffers & Sam R. Sumner, Wenatchee, Washington; Graves, Kizer & Graves, Old National Bank Bldg., Spokane 8, Wash.; Thomas Malott, Old National Bank Bldg., Spokane 8, Wash.; E. A. Cornelius, Paulsen Building, Spokane 8, Wash., Attorneys for Defendants in related cases.

Before Driver, District Judge.

Plaintiff brought this action as trustee of Northwest Chemurgy Cooperative, a bankrupt corporation, referred to as "Chemurgy" in this opinion, to recover an alleged unlawful preference. The basic facts, as stated in the complaint, which was filed on May 28, 1948, are as follows:

On May 29, 1947, Chemurgy filed a petition for

an arrangement under Chapter XI of the Bankruptcy Act (11 U.S.C.A., Sec. 701 et seq.), but was unable to consummate the proposed arrangement and was adjudicated bankrupt on December 13, 1947. Plaintiff was appointed trustee on January 6, 1948. For at least four months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of the laws of the State of Washington. During that time, it paid to defendant a certain amount upon an antecedent debt. The prayer is for judgment against the defendant in that amount.

As expressly avowed in the complaint, the action is based upon a Washington statute, which provides that within specified limitations, a receiver (defined to include trustee) may recover a preference, made by an insolvent corporation.[1] The

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[1]Chap. 103, Laws of Wash., 1941 (Rem. Rev. Stat., Secs. 5831-4, 5831-5, 5831-6), which reads, in part, as follows: "Section 1. Words and terms used in this act shall be defined as follows: (a) 'Receiver' means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) 'Date of application' means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made; or in case the appointment of a receiver is lawfully made without court proceedings, then it means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) 'Preference' means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such

limitations are, first, that the preference must occur within four months prior to the date of application for the appointment of the trustee and, second, that the action to recover the preference must be commenced within six months thereafter. Defendant's motion to dismiss challenges the sufficiency of the complaint to show compliance with the statutory limitations. If a claim, upon which relief can be had, has not been made out in accordance with the statute, the motion should be granted.[2]

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corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. Sec. 2. If not otherwise limited by law, actions in the courts of this state by a receiver to recover preferences may be commenced at any time within but not after six (6) months, from the date of application for the appointment of such receiver. Sec. 3. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded."

[2]The complaint does not state a claim for avoidance of a preference under Sec. 60 of the Bankruptcy Act (11 U.S.C.A., Sec. 96) since that section requires a showing that the favored creditor had reasonable cause to believe the debtor was insolvent. The Washington Statute has no such requirement.

The crucial event on which the reckoning of time is based as to both limitations is the filing of the application for the appointment of the trustee. The first inquiry in the present case, then, logically, should be whether the filing of the petition for an arrangement was equivalent to an application for the appointment of the trustee within the meaning of the Washington Act. Section 376, Chapter 11, of the Bankruptcy Act (11 U.S.C.A., Sec. 776) provides that when an original petition for arrangement is filed and the arrangement is not consummated, the court may, without any further pleading, adjudicate the debtor a bankrupt and carry on the bankruptcy proceedings in the usual way. The petition for arrangement, from its inception, serves the purpose of an alternative petition for adjudication. When the arrangement fails of accomplishment, adjudication and subsequent bankruptcy proceedings, including the appointment of a trustee, follow as a matter of course. The petition for arrangement is the only petition, or application, ever filed, pursuant to which the appointment of the trustee is made. In legal effect, it is the same thing as the application for the appointment of the trustee.

The petition was filed herein on May 29, 1947, and the action was not commenced until May 28, 1948. Obviously, it is barred by the requirement of the State statute that it be commenced within six months, if that statute is applicable and is not superseded by some over-riding provision of the Federal Bankruptcy Act.

The plaintiff earnestly urges that the State statute is not applicable because of the following language (italicized for emphasis) of section 2, namely: "*If not otherwise limited by law,*" an action may be brought by a trustee "*in the courts of this state*" to recover a preference within but not after six months from the filing of the petition for the appointment of the trustee. The argument is that the action is "otherwise limited" by the general two-year limitation in Section 11e of the Bankruptcy Act (11 U.S.C.A., 1947 pocket part, Sec. 29e) and, furthermore, that the six months' limitation in the State Act, by its terms, is restricted to State Court actions and is wholly inoperative in actions prosecuted in the Federal Courts. I do not so construe the State Act. I think that the words, "unless otherwise limited by law," apply only to the affirmative grant of the right to bring the action within the specified time and should not be construed, as plaintiff's argument implies, to mean "unless otherwise *extended* by law." The statute says that an action to recover a preference *may* be brought in six months, but the phrase under consideration makes it clear that the grant is not an absolute one and will not sustain an action barred by some other applicable law. It may have been included in Section 2 in order to avoid all possibility of conflict with the provision of Section 3 (Rem. Rev. Stat. 5831-6) limiting recovery of preferences to transactions which occurred within four months prior to the application for appointment of the receiver or trustee. The language of Section 2 makes it clear that if

the action is barred by Section 3, the affirmative grant in Section 2 will not revive it.

However, I think the language in Section 2 "in the courts of this State," should not be construed as a legislative declaration that if the action to set aside a preference is brought in a Federal Court, or in a court of a foreign state, the six months' limitation does not apply. The statute is a further modification of the trust fund doctrine, a long-standing Washington rule that the assets of an insolvent corporation constitute a trust fund for the benefit of its creditors and that transactions, which prefer one creditor over another, are voidable.[3] The Washington Supreme Court had described the doctrine as "our court made rule."[4] It was a natural thing for the Legislature, in restricting it, to use the expression, "in the courts of this State." The six months' limitation in Section 2, since it is an integral part of the statute granting the right of action, by a generally accepted rule, is not an ordinary limitation of the remedy, but a limitation of the right, which must be accepted and applied by the courts of any other state where an action to enforce the right may be brought.[5] It would, in-

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[3]See Whiting v. Rubenstein, 7 Wn. (2d) 204, 214. There was an earlier restriction of the trust fund doctrine in Chap. 47, Laws of Wash., 931 (Rem. Rev. Stat. 5831-1, 5831-2, 5831-3, repealed by the 1941 Act (Chap. 103, Laws of Wash., 1941).

[4]Meier v. Commercial Tire Co., 179 Wash. 449, 451.

[5]See Restatement, Conflict of Laws, Sec. 605; 15 C.J.S., Conflict of Laws, Sec. 22e.

deed, be a violent assumption that the Legislature, by the mere use of the phrase, "in the courts of this State," intended to set aside the well known rule and make its express, special limitation of the right of action, which it had created, operative only in the courts of Washington and not in any other courts.

Plaintiff argues that even if the six months' limitation, set up by the Washington statute, is applicable in Federal Court actions, the limitation, nevertheless, is superseded by Section 11e of the Bankruptcy Act (11 US.C.A., 1947 pocket part, 29e), which provides, in part:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy."

I think that there is merit in the argument. The language of the section is clear and unambiguous. It specifically authorizes a trustee to bring an action, within two years after adjudication, on a claim which would have expired by State law between the date of the filing of the petition and the date of adjudication. The legislative history of 11e, moreover, indicates that such was the intention of Congress.[6]

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[6]See Sproul v. Gambone, 34 F. Supp. 441, 444, and Herget v. Central Bank Co., 324 U. S. 4, footnote 5, p. 7.

Prior to the passage of the Chandler Act (52 Stat. 840) in 1938, Section 11d of the Bankruptcy Act of 1898 (30 Stat. 544, 549) barred actions brought by or against trustees subsequent to two years after the bankrupt estate had been closed. There was a sharp conflict among the courts as to whether it took precedence over State statutes of limitation in cases inherited by the trustee from the bankrupt or from his creditors. One of the main reasons for the enactment of the new Section 11e was to settle that conflict by giving the trustee the right to bring any type of action, whether acquired by inheritance or otherwise, within two years after adjudication if the limitation under applicable Federal or State law had not expired at the time of the filing of the petition for adjudication.[7]

Defendant argues, however, that since the six months' limitation is contained in the same State statute, which creates the right of action, compliance with its requirements is a condition precedent to the bringing of the action and that the plaintiff must take the statute with the condition or not at all.

As stated above, the six months' limitation in the State statute is not an ordinary limitation that a defendant may assert as a remedial bar, but is a condition upon the substantive right to recover a

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[7]For an enlightening discussion of the conflict under old Sec. 11d and the effect upon it of the enactment of the new Sec. 11e of the Chandler Act, see McBride v. Farrington, 60 F. Supp. 92. See also Herget v. Central Bank Co., cited in footnote 6.

preference under the statute. It has, in fact, been so construed by the Washington Supreme Court.[8] Congress, however, under the Federal Constitution, has the broad power to establish uniform laws on the subject of bankruptcies. U. S. Const., Art. I, Sec. 8, Clause 4. That subject has been defined by the Supreme Court as "the relations between and insolvent or non-paying, or fraudulent, debtor and his creditors extending to his and their relief." Wright v. Union Central Life Ins. Co., 304 U. S. 502, 513. This broad power of Congress, when it comes into conflict with State law, is not limited to the procedural field. It may, and, in practice, frequently does, affect substantive rights as well. The discharge of a debtor directly and vitally affects the substantive rights of his creditors.

A Court of Bankruptcy may adversely affect the substantive interests of lien holders, pledgees, and mortgagees by marshalling the liens and selling the property free of encumbrances, or by enjoining the sale of collateral or of the mortgaged real property in order to effectuate the purposes of the Bankruptcy Act.[9] The only restrictions on the plenary, constitutionally conferred bankruptcy power of Congress are those to be found in other provisions of the Constitution. In the exercise of the power,

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[8]Morris v. Orcas Lime Co., 185 Wash. 126, 130; Peeples v. Hayes, 4 Wn. (2d) 253, 257.

[9]Van Huffel v. Harkelrode, 284 U. S. 225, 227; Continental Illinois Nat. Bank and Trust Co. v. Chicago R. I. & P. Ry. Co., 294 U. S. 648, 680-681; Wright v. Vinton Branch, 300 U. S. 470.

Congress may alter and adversely affect substantive property rights so long as it does not go beyond the limits fixed by the due process clause,[10] or by the clause which forbids the taking, without just compensation, of private property for public use,[11] of the Fifth Amendment.

It is my conclusion, therefore, that by the enactment of Section 11e of the Chandler Act, Congress undertook to supersede a State statute of limitations in a case such as the one now before me, regardless of whether the limitation would bar the remedy or the right and that in so doing, Congress did not exceed the power conferred upon it by the bankruptcy provisions of the Constitution. My views find support in Sproul v. Gambone, 34 F. Supp. 441 (cited in footnote 6), decided in 1940. There the Court had under consideration a Pennsylvania bulk sales statute, which provided that a proceeding against the purchaser to set aside a sale prohibited by the Act must be brought within ninety days after the date of sale. The action in the Federal District Court was not brought until after the ninety-day period had expired. The plaintiff contended that Section 11e of the Bankruptcy Act superseded the limitation fixed by the State law and Court sustained his contention.

The case of In Re Appalachian Publishers, Inc., 29 F. Supp. 1021, appears to be contrary to my views. There the Court held that a special limita-

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[10]Wright v. Union Central Ins. Co., 304 U. S. 502.

[11]Louisville Bank v. Radford, 295 U. S. 555.

tion in a Federal Statute took precedence over the general two-year limitation in the Bankruptcy Act. However, the opinion does not discuss Section 11e of the Chandler Act and the case was decided in 1939, before the Supreme Court, in Herget v. Central Bank Co. (cited in footnote 6), had expressed its conception of the broad reach of that section. At any rate, I do not accept the theory that when a statute, creating a right of action, imposes a time limit on its exercise, the right does not come into existence at all unless and until an action to enforce it is instituted within the specified time. I prefer the reasoning, implicit in Sproul v. Gambone, that such a limitation does not prevent the genesis of the right, but only makes provision for its expiration when the limitation has run.

In the present case, upon the filing of the petition for appointment of a trustee, within four months after the preference alleged in the complaint, a right of action came into being under the terms of the State statute and the right continued to exist for a period of six months. At the expiration of that time, the right of action ordinarily would have died, but in this case, Section 11e of the Bankruptcy Act preserved and extended it for the period of two years subsequent to adjudication.

The defendant's motion to dismiss will be denied.

For the reasons stated above, the motion to dismiss will be denied also in each of the following cases:

No. 725, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. George W. Batterman, Jr. & George Batterman, Sr., d/b/a Batterman's Sand & Gravel Co.

No. 727, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Joe Earhart.

No. 728, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. E. T. Pybus.

No. 729, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Wenatchee Lumber Co., a corporation.

No. 731, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Wells & Wade, Inc., a corporation.

No. 733, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Interstate Telephone Co., a corporation.

No. 734, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. W. R. McMullen and B. F. McMullen, d/b/a McMullen Office Equipment Co.

No. 735, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a cor-

poration, Bankrupt, vs. Peshastin Lumber & Box Co.

No. 736, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. F. W. Heimbigner.

No. 737, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Rufus Woods.

No. 738, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. J. A. Weber.

No. 740, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. W. N. Childs.

No. 742, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. R. M. Wiley.

No. 744, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Elmer Schneidmiller.

No. 745, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, vs. Arthur Benzel.

/s/ SAM M. DRIVER,
United States District Judge.

Dated this 4th day of January, 1949.

[Endorsed]: Filed Jan. 5, 1949.

In the District Court of the United States, for the Eastern District of Washington, Northern Division

Civil Action—No. 744

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt,

Plaintiff,

vs.

ELMER SCHNEIDMILLER,

Defendant.

ORDER DENYING MOTION TO DISMISS

The motion of the defendant to dismiss this action came on regularly for hearing before the undersigned Judge of the above-entitled Court on August 23rd, 1948, the parties being represented in court by their attorneys of record herein. The Court heard the argument of counsel and thereafter considered the briefs filed on behalf of the parties. On January 5th, 1948, the Court made and filed his opinion herein denying said motion.

Now, Therefore, in accordance with said opinion and ruling and pursuant thereto, it is hereby ordered that defendant's said motion to dismiss be and the same is hereby denied. The exception of the defendant is noted.

Done in Open Court this 27th day of January, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:

/s/ DeWITT WILLIAMS,
Of attorneys for plaintiff.

Approved as to Form and Entry:

/s/ HUGHES & JEFFERS,
Attorney for defendant.

[Endorsed]: Filed Jan. 27, 1949.

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant and answering plaintiff's complaint herein admits as follows:

I.

Answering Paragraphs one to nine inclusive, defendant admits the allegations of said paragraphs.

Wherefore having fully answered, defendant prays that the Court conclude as a matter of law that the plaintiff is not entitled to recover herein and that this action be dismissed with prejudice and with costs taxed in favor of the defendant and against the plaintiff.

/s/ HUGHES & JEFFERS,
/s/ SAM R. SUMNER, SR.,
Of Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The undersigned Judge of the above-entitled Court having heretofore overruled and denied defendant's motion to dismiss this action and the defendant thereafter having filed herein his answer admitting each of the allegations of the complaint, now, therefore, the Court finds the facts in accordance with the allegations of the complaint as follows:

FINDINGS OF FACT

1. The action arises under Section 70 of the Act of Congress relating to Bankruptcy, (U.S.C. Title 11, Chapter 7, Sec. 110) as hereinafter more fully appears.

2. At all times herein mentioned Northwest Chemurgy Cooperative was and is now a Washington corporation hereinafter sometimes referred to as "Chemurgy."

3. On May 29, 1947, Chemurgy duly filed a Petition for an Arrangement under Chapter XI of the Act of Congress relating to Bankruptcy in the United States District Court for the Western District of Washington, Northern Division, Cause No. 37569. On said date said Court entered an order accepting and approving Chemurgy's Petition for an Arrangement as properly filed under Chapter XI of said Act.

4. Chemurgy was unable to consummate the pro-

posed Arrangement and upon a hearing duly noticed and held pursuant to Section 367 (2) of the Act of Congress relating to Bankruptcy, said Court on December 13, 1947, duly made and entered its order that Chemurgy is a Bankrupt under said Act and that Bankruptcy be proceeded with pursuant to the provisions of said Act.

5. Subsequent to said order determining Chemurgy a Bankrupt, after proceedings duly had therefore, plaintiff on January 6, 1948, was by the order of said Court duly appointed Trustee of the estate of said Bankrupt and thereafter on said January 6, 1948, plaintiff duly qualified as Trustee of said estate and since said date at all times has been the duly appointed, qualified and acting Trustee of the estate of said Bankrupt.

6. At all times herein mentioned Sections 5831-4 and 5831-6 of Remington's Revised Statutes of the State of Washington (Laws of 1941, Ch. 103), Secs. 1 and 3 were in full force and effect. Said statutes provide as follows:

"5831-4, Preference by insolvent corporation—Definition. Words and terms used in this act shall be defined as follows: (a) "Receiver" means any receiver, trustee, common law assignee, or other liquidating officer of an insolvent corporation. (b) "Date of application" means the date of filing with the Clerk of the Court of the petition or other application for the appointment of a receiver, pursuant to which application such appointment is made, or in case the appointment of a receiver is lawfully made without court proceedings, then it

means the date on which the receiver is designated, elected or otherwise authorized to act as such. (c) "Preference" means a judgment procured or suffered against itself by an insolvent corporation or a transfer of any of the property of such corporation, the effect of the enforcement of which judgment or transfer at the time it was procured, suffered, or made, would be to enable any one of the creditors of such corporation to obtain a greater percentage of his debt than any other creditor of the same class. L. '41, ch. 103, Sec. 1."

"5831-6 Preference voidable when—Trust fund doctrine superseded. Any preference made or suffered within four (4) months before the date of application for the appointment of a receiver may be avoided and the property or its value recovered by such receiver. No preferences made or suffered prior to such four (4) months' period may be recovered, and all provisions of law or of the trust fund doctrine permitting recovery of any preference made beyond such four (4) months' period are hereby specifically superseded. L. '41, ch. 103, Sec. 4."

7. For at least four (4) months immediately prior to May 29, 1947, Chemurgy was unable to pay its debts in the ordinary course of business and was insolvent within the meaning of said statutes of the State of Washington.

8. Within said four months' period Chemurgy being then insolvent paid to the defendant above named a total of $4,766.03 upon an antecedent debt then past due and owing by Chemurgy to said de-

fendant upon which defendant is entitled to no offset.

9. The effect of such payment is to enable the said defendant to obtain a greater percentage of the indebtedness due to said defendant than other creditors of the same class.

/s/ SAM M. DRIVER,
Judge.

From the foregoing findings of fact the Court draws the following:

CONCLUSION OF LAW

1. Plaintiff is entitled to judgment against the defendant in the sum of $4,766.03 with interest thereon at the rate of 6% per annum from May 28, 1948, until paid and for plaintiff's costs herein to be taxed in the sum of $42.00.

The foregoing findings of fact and conclusion of law made and entered this 25th day of March, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:
/s/ DeWITT WILLIAMS,
Of attorneys for plaintiff.

Approved as to Form for Entry:
/s/ HUGHES & JEFFERS,
Of attorneys for defendant.

NOTATION OF DEFENDANT'S OBJECTION

It is hereby noted that at the time the foregoing conclusion of law was made, the defendant made known to the Court his desire that the Court conclude as a matter of law, that the plaintiff is not entitled to recover from the defendant on the ground that relief cannot be granted on the complaint and facts found for the following reasons:

1. The filing of a petition for an arrangement under Chapter XI of the Act of Congress relating to Bankruptcy was not the filing of a petition for the appointment of a receiver within the meaning of Remington Revised Statutes of the State of Washington, 5831-4, and therefore the payment referred to in Paragraph 8 of the Findings of Fact herein was not made within the four (4) months period designated by Rem. Rev. Stat. 5831-6 and/or

2. This action was not commenced within the six months period designated in Rem. Rev. Stat. 5831-5.

This notation of objection and request for dismissal of this action made this 25th day of March, 1949.

/s/ SAM M. DRIVER,
Judge.

[Endorsed]: Filed March 25, 1949.

In the United States District Court for the Eastern District of Washington, Northern Division

In Bankruptcy—No. 744

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt,

Plaintiff,

vs.

ELMER SCHNEIDMILLER,

Defendant.

JUDGMENT

This matter came on regularly before the undersigned Judge of the above-entitled Court on the 25th day of March, 1949, for the entry of judgment pursuant to findings of fact and conclusions of law entered this date; now, therefore, pursuant to said findings and conclusion it is hereby

Ordered, Adjudged and Decreed that the plaintiff Adolph W. Engstrom, as Trustee in Bankruptcy for the above-named bankrupt corporation, be, and he is hereby, granted judgment against the defendant, Elmer Schneidmiller, in the sum of Four Thousand Seven Hundred Sixty-six Dollars and three Cents ($4,766.03), with interest thereon at the rate of 6 per cent per annum from May 28, 1948, until paid and for plaintiff's costs herein to be taxed by the Clerk in the sum of $42.00.

This judgment made and entered in open Court this 25th day of March, 1949.

/s/ SAM M. DRIVER,
Judge.

Presented by:
/s/ DeWITT WILLIAMS,
Of Attorneys for Plaintiff.

Approved as to form for entry.
/s/ HUGHES & JEFFERS,
/s/ SAM R. SUMNER, SR.,
Of Attorneys for Defendant.

[Endorsed]: Filed March 25, 1949.

[Title of District Court and Cause.]

MEMORANDUM OF COSTS AND DISBURSEMENTS

DISBURSEMENTS

Clerk's Fees, $15.00; Marshal's Fees, $7.00; Attorney's Fees, $20.00. Total, $42.00; Amount Allowed, $42.00.

Taxed March 25th, 1949.

/s/ A. A. LaFRAMBOISE,
Clerk.

United States of America,
Eastern District of Washington—ss:

DeWitt Williams, being duly sworn, deposes and says: That he is one of attorneys for the Plaintiff in the above-entitled cause; and as such has knowledge

of the facts herein set forth; that the items in the above memorandum contained are correct to the best of this deponent's knowledge and belief, and that the said disbursements have been necessarily incurred in the said cause and that the services charged herein have been actually and necessarily performed as herein stated.

/s/ DeWITT WILLIAMS.

Subscribed and sworn to before me, this 25th day of March, 1949.

(Seal) /s/ A. A. LaFRAMBOISE,
Clerk.

[Endorsed]: Filed Mar. 25, 1949.

In the United States District Court for the Eastern District of Washington, Northern Division

Cases Numbered 724, 725, 727, 728, 729, 731, 733, 734, 735, 736, 737, 738, and 744, 739, 740, 741.

In Re Actions by Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, to Recover Preferences.

STIPULATION

Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, has filed in the above-entitled court certain actions to recover preferences alleged to have been paid by said bankrupt

corporation, which actions include those against the following defendants and bearing the following case numbers:

Engstrom v. Florin—No. 741.

Engstrom v. Koch—No. 739.

Engstrom v. DeVos—No. 724.

Engstrom v. Batterman—No. 725.

Engstrom v. Earhart—No. 727.

Engstrom v. Pybus—No. 728.

Engstrom v. Wenatchee Lumber Co.—No. 729.

Engstrom v. Wells & Wade, Inc.,—No. 731.

Engstrom v. Interstate Telephone Co.—No. 722.

Engstrom v. McMullen—No. 734.

Engstrom v. Peshastin Lumber & Box Co.—No. 735.

Engstrom v. Heimbigner—No. 736.

Engstrom v. Woods—No. 737.

Engstrom v. Weber—No. 738.

Engstrom v. Schneidmiller—No. 744.

Engstrom v. Childs—No. 740.

Motions to Dismiss the Complaints in said actions have been argued before the Honorable Sam Driver, Judge of the above-entitled Court, and the motions have been denied and overruled. The Defendants in said numbered actions desire an appeal from said ruling and the parties hereto agree to abide by the

results reached upon the final appeal from said ruling as hereinafter provided, such appeal to be taken from judgment for the plaintiff to be entered in the case hereinafter designated.

The parties to said actions listed above, by their attorneys of record therein, hereby agree as follows:

1. An answer will be filed immediately in Engstrom v. Schneidmiller, Case No. 744, admitting the allegations of the complaint, and findings and judgment in accordance with the allegations and prayer of the complaint will be approved as to form by the defendant as soon as possible in order that appeal may be taken from the entry of said judgment. Appropriate statements will be endorsed on the court's conclusions evidencing the fact that the defendant has made known to the court his objection to the entry of said conclusions and his desire that the action be dismissed because the complaint fails to state a claim on which relief can be granted. The filing of said answer and the approval as to form of said findings and judgment shall in no event be deemed a waiver of the position of the defendant in the action in which judgment is entered as aforesaid, that the complaint fails to state a claim upon which relief can be granted.

2. In the event the judgment entered in said Case No. 744 is affirmed upon final appeal, it is agreed that judgment may be taken in accordance with prayer of the complaints in each of the above-numbered cases, save in those cases where a dispute exists as to the amounts received in the four months'

period that are claimed to be preferential. In such cases it may be necessary to present the facts to the court in order to determine the amount of preference, but as soon as the disputed amounts have been determined by the court, judgments in the amount determined by the court shall be entered as hereinafter provided in the same manner and with like effect as in the cases where the amounts received in the four months' period are not in dispute. However, in such of the cases where there is no issue as to the amounts received in said four months' period the defendants therein, in such event, agree to file such answers and to approve for entry such findings of fact and conclusions of law as may be necessary to obtain the immediate entry of judgments in accordance with the prayers of the complaints in said cases, from which judgments there will be no appeal.

3. The plaintiff in said actions hereby agrees that if, upon final appeal from the judgment entered in said Case No. 744, it is held that the complaint therein does not state facts upon which relief can be granted, and therefore said action is ordered dismissed, then the plaintiff will dismiss with prejudice the remainder of said above-numbered cases.

4. To carry out the intent of this agreement, it is agreed that pending the appeal in said Case No. 744, no further action will be required of any of the parties and the above-entitled court will be requested to hold the cases in abeyance pending said appeal and final disposition of these cases as agreed upon herein.

5. At least six (6) copies of this stipulation and agreement will be executed on behalf of the parties to said actions by their attorneys of record and any party may file an executed copy or a photostatic copy of this stipulation in any of said above-numbered cases, such photostatic copy to have the same force and effect as an original executed copy.

Dated this 24th day of March, 1949.

W. N. CHILDS,
By E. A. CORNELIUS,
His Attorney.

MRS. HERMAN KOCH,
HERMAN KOCH,
DAVE FLORIN,
By E. A. CORNELIUS,
Their Attorney.

F. A. DE VOS,
GEORGE E. BATTERMAN, SR., & GEORGE W. BATTERMAN, JR., d/b/a BATTERMAN'S SAND & GRAVEL CO.,
JOE EARHART,
E. T. PYBUS,
WENATCHEE LUMBER CO.,
WELLS & WADE, INC.,
PESHASTIN LUMBER & BOX CO.,
F. W. HEIMBIGNER,
RUFUS WOODS,
J. A. WEBER,
ELMER SCHNEIDMILLER,
By HUGHES & JEFFERS,
Their Attorneys.

INTERSTATE TELEPHONE COMPANY,
By GRAVES, KIZER & GRAVES,
Its Attorneys.

W. R. McMULLEN,
By THOS. MALETT,
His Attorney.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for NORTHWEST CHEMURGY COOPERATIVE,
By EGGERMAN, ROSLING & WILLIAMS,
DE WITT WILLIAMS,
His Attorneys.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, Plaintiff, and Messrs. Eggerman, Rosling & Williams, your attorneys.

You and each of you are hereby notified that the above-named defendant, Elmer Schneidmiller, does hereby appeal to the United States Circuit Court of Appeals of the Ninth Circuit from the final judgment rendered and entered in the above-entitled cause on the 25th day of March, 1949, and from each and every part thereof.

Dated this 14th day of April, 1949.

/s/ JOSEPH L. HUGHES,
/s/ BENJAMIN H. KIZER,
Attorneys for Defendant Elmer Schneidmiller.

GRAVES, KIZER & GRAVES,
Of Counsel.

Copy of this Notice of Appeal mailed DeWitt Williams, of Attorneys for Plaintiff, this 14th day of April, 1949.

A. A. LaFRAMBOISE,
Clerk.

/s/ EVA N. HARDIN,
Deputy Clerk.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents, That we, Elmer Schneidmiller, as principal, and Fireman's Fund Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of California and duly authorized to transact the business of indemnity and suretyship in the State of Washington, as Surety, are held and firmly bound unto the plaintiff in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said plaintiff, Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, Bankrupt, his certain attorneys, personal representatives or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs and personal representatives, jointly and severally, by these presents.

Dated this 14th day of April, 1949.

Whereas, lately at a District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said Court between the said Adolph W. Engstrom, Trustee, as aforesaid plaintiff, and Elmer Schneidmiller, defendant, a judgment was rendered against the said Elmer Schneidmiller and the said Elmer Schneidmiller is appealing from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit;

Now, the condition of the above obligation is such, that if the said Elmer Schneidmiller shall prosecute

said appeal to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

ELMER SCHNEIDMILLER,
Principal.

By /s/ JOSEPH L. HUGHES,
By /s/ BENJAMIN H. KIZER,
His Attorneys.

(Seal) FIREMAN'S FUND
INDEMNITY COMPANY,
By /s/ Illegible.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Herewith we hand you notice of appeal and bond on appeal in the above-entitled cause.

Will you please prepare the record on appeal in the manner provided by Rule 75 consisting of all material pleadings, which includes:

1. Complaint of plaintiff.
2. Motion to dismiss of defendant.
3. Opinion of court.
4. Answer.
5. Findings of fact and conclusions of law.
6. Notice of defendant's objections.

7. Judgment.
8. Stipulation of March 24, 1949.
9. Notice of appeal.
10. This designation.

Yours faithfully,

/s/ JOSEPH L. HUGHES,
/s/ BENJAMIN H. KIZER,
Attorneys for Defendant.

[Endorsed]: Filed April 14, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the Original, except as noted,

Complaint. Summons and return of service on defendant. Motion to dismiss, defendant's. Opinion of the court on motion to dismiss, copy which I certify to be a true and correct copy of Original on file in Cause No. 724 and applicable to this cause. Order denying motion to dismiss. Answer of defendant. Findings of fact and conclusions of law. Judgment. Memorandum of costs. Stipulation to hold cases in abeyance pending this appeal, copy which I certify to be a true and correct copy of Original on file in Cause No. 724 and applicable to this cause. Notice of appeal. Bond on appeal. Designation of record on appeal on file in the above-entitled cause, and that

the same constitutes the record for hearing of the Appeal from the Judgment of the District Court in the United States Court of Appeals for the Ninth Circuit as called for by the Appellant in his designation of record on appeal.

I further certify that the above enumerated documents constitute the complete file in the above-entitled cause.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 28th day of April, A.D. 1949.

(Seal) /s/ A. A. LaFRAMBOISE,
Clerk of said District Court.

[Endorsed]: No. 12235. United States Court of Appeals for the Ninth Circuit. Elmer Schneidmiller, Appellant, vs. Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed May 2, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 12235

ELMER SCHNEIDMILLER,

Appellant.

vs.

ADOLPH W. ENGSTROM, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, bankrupt,

Respondent.

APPELLANT'S STATEMENT OF POINTS AND DESIGNATION OF RECORD

To Adolph W. Engstrom, Trustee in Bankruptcy for Northwest Chemurgy Cooperative, a corporation, bankrupt, and to Messrs. Eggerman, Rosling & Williams, his attorneys:

You and each of you are hereby notified that appellant's statement of points on this appeal is as follows:

First: Chemurgy's petition for an arrangement was not an application for an appointment of a receiver,

Second: Appointment of trustee in bankruptcy not made "pursuant to" Chemurgy's petition for an arrangement,

Third: Respondent's suit not brought in time, and that the designation of record by appellant is as follows: Complaint, summons and return of service on defendant, motion to dismiss, defendant's; opinion of the court on motion to dismiss, order denying mo-

tion to dismiss, answer of defendant, findings of fact and conclusions of law, judgment, memorandum of costs, stipulation to hold cases in abeyance pending this appeal, notice of appeal, bond on appeal, designation of record on appeal, clerk's certificate.

Dated May 7, 1949.

/s/ JOSEPH L. HUGHES,
/s/ BENJAMIN H. KIZER,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed May 12, 1949. Paul P. O'Brien, Clerk.